



STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 6577-11
DCR DOCKET NO. EL02JB-61734

CLYDE JONES,

Complainant,

v.

VERIZON CONNECTED SOLUTIONS,

Respondent.

Administrative Action

**FINDINGS, DETERMINATION
AND ORDER**

APPEARANCES:

William B. Hildebrand, Esq., for the complainant.

Martin W. Aron, Esq., (Jackson Lewis, attorneys) for the respondent.

BY THE DIRECTOR:

This matter is before the Director of the New Jersey Division on Civil Rights (DCR) pursuant to a verified complaint filed by Clyde Jones (Complainant) alleging that Verizon Connected Solutions (Respondent) subjected him to unlawful reprisal in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On July 30, 2012, the Honorable Tiffany M. Williams, Administrative Law Judge (ALJ), issued an initial decision granting Respondent's motion for summary decision and dismissing Complainant's complaint. Having reviewed the record in the light most favorable to the Complainant as the non-moving party, the Director adopts the ALJ's decision as modified herein.

PROCEDURAL HISTORY

On September 23, 2010, Complainant filed a complaint alleging that Respondent suspended him on two occasions in retaliation for filing a discrimination complaint a year earlier. Prior to a probable cause determination by DCR, the retaliation matter was transmitted to the Office of Administrative Law at Complainant's request pursuant to N.J.S.A. 10:5-13, where it was filed as a contested case on June 8, 2011, in accordance with the Administrative Procedure Act. N.J.S.A. 52:14B-1 to 15; see also N.J.S.A. 52:14F-1 to 13.

On January 13, 2012, Respondent moved for summary decision arguing that Complainant could not establish a *prima facie* case of retaliation because the DCR issued a finding of "no probable cause" in the prior discrimination complaint. Complainant opposed the motion arguing that there were disputed facts that warranted a hearing. Oral argument was held on February 13, 2012, and the ALJ issued her initial decision on July 30, 2012. Complainant submitted his exceptions on August 11, 2012, and Respondent submitted its reply on August 20, 2012. The time for issuing this final order was extended to December 13, 2012.

THE ALJ'S DECISION

The ALJ found the following facts to be undisputed. Complainant is an African-American male employed by Respondent as a Multimedia Service Technician. On or about September 3, 2009, Complainant filed a verified complaint with DCR alleging that Respondent discriminated against him based on race when it (1) suspended him for refusing to take a 28-foot ladder on his truck but did not suspend a Caucasian co-worker for the same conduct; (2) denied his vacation requests while granting the subsequent vacation requests of Caucasian co-workers; (3) issued a warning to Complainant for arriving ten seconds late while failing to issue warnings to Caucasian co-workers who were twenty and forty minutes late; and (4) targeted Complainant

and other African-American workers by issuing them GPS monitors to track their productivity. (ID 2.)¹

While that investigation was on-going, Complainant was suspended from work on two occasions. On August 6, 2010, he received a one-day suspension on the grounds that he took approximately three hours to complete a job on July 1, 2010, “failed to report to the JEP desk at the completion of his job,” failed to record his time accurately, could not account for all his time spent on the job, and failed to turn in required documentation. (ID 3.)

On September 7, 2010, he received a ten-day suspension after a local manager, Steven Thompson, went to check on Complainant’s progress on a job that seemed to be taking too long. Thompson stated that when he arrived at the site, he observed various safety and performance violations (ibid.), namely, Complainant parked his van in a dangerous location on the parkway, failed to wear a reflective vest, turned his back to traffic, wore improper footwear, placed only one orange cone in front of the van instead of the required six, could not account for ninety minutes of his time, failed to verify service on all the customer’s telephone jacks which resulted in one less number working than when Complainant began the job, and provided false information during an internal investigation about whether he wore proper footwear and used his personal cell phone while operating his vehicle. (Cert. of Stephen Thompson, ¶¶ 2-7; Cert. of William McQuaid, ¶¶ 22-33.)

On September 23, 2010, Complainant filed the instant verified complaint with the DCR alleging that the two suspensions amounted to retaliation for his September 3, 2009 complaint.

¹ Hereinafter, “ID” refers to the ALJ’s initial decision. “CE” refers to Complainant’s exceptions dated August 11, 2012. “RE” refers to Respondent’s reply dated August 20, 2012. TR refers to the transcript of Complainant’s deposition taken on January 3, 2012.

On September 30, 2010, after investigating the initial complaint and finding insufficient evidence to credit Complainant's allegations of race discrimination, the DCR issued a finding of "no probable cause" on the 2009 complaint. (ID-2.)

The ALJ determined that the retaliation issue was ripe for summary decision because the facts material to Respondent's motion were not in dispute. (ID 4) (citing N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insur. Co. of Amer., 142 N.J. 520, 523 (1995)). The ALJ stated that the New Jersey Supreme Court applies a three part burden-shifting analysis when analyzing such employment claims. (ID 4) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Under that analysis, a party asserting a retaliation claim under the LAD must come forward with sufficient evidence to constitute a *prima facie* case. If the *prima facie* case is established, the defendant must produce a legitimate, non-retaliatory reason for its adverse employment decision. If the defendant satisfies that burden, the plaintiff is given the opportunity to show that the defendant's stated reason was merely a pretext for unlawful reprisal. (ID 4) (citing Dixon v. Rutgers Univ., 110 N.J. 432, 442 (1988)).

The ALJ noted that the DCR investigation did not corroborate any of the Complainant's four allegations in the prior discrimination case. In particular, the investigation found no evidence that (1) only African-American employees were issued GPS devices; (2) a Caucasian co-worker refused to take a 28-foot ladder on his truck; (3) Caucasian employees were not disciplined for tardiness; or that (4) vacation days sought by Complainant were granted to Caucasian co-workers. The ALJ stated that the DCR's findings were entitled to deferential weight and "support[ed] a finding" that the underlying discrimination complaint was "completely unfounded" and "unreasonable." (ID 6.) In making that finding, the ALJ found it significant that the Complainant appeared to acknowledge that one of his allegations was inaccurate. The ALJ wrote:

[T]he DCR rejected Jones' claim that only African-American employees were issued GPS devices and specifically found that Caucasian employees were issued GPS devices as well. Jones confirmed his knowledge of that fact in his deposition.

(Ibid.) The ALJ found that Complainant failed to establish a "causal link between the filing of his original complaint with the DCR and the two suspensions that form the basis of his retaliation complaint." (Ibid.) The ALJ wrote:

While the burden is not an onerous one, nonetheless, Jones failed to establish that the timing (eleven months later) was unusually suggestive or any circumstantial evidence of antagonistic behavior existed to justify Verizon's decision to impose discipline.

(Ibid.) Lastly, the ALJ found that Complainant could not show that Respondent's proffered reasons for the suspensions were pretextual, and that Complainant's supporting affidavit did not demonstrate that he was treated less favorably than similarly situated co-workers. The ALJ noted that prior to the two suspensions at issue, Complainant's disciplinary history included four written warnings, five general discussions, and four days of suspension. (ID 3.) The ALJ stated that Complainant's affidavit "focuse[d] primarily on proving the underlying facts of the original complaint," and suggested that those issues should not be "re-litigate[d]." (ID 7.) Thus, the ALJ found the record "devoid of sufficient evidence of triable issues suitable for an administrative hearing," such that the complaint should be dismissed. (Ibid.)

DISCUSSION

The LAD prohibits employers from retaliating against employees for reporting or complaining about race discrimination. N.J.S.A. 10:5-12(d). A complainant's burden to establish a *prima facie* case is "not an onerous one." Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant must show that he engaged in LAD-protected activity known to his employer, that the employer thereafter subjected him to adverse employment action, and that there was a causal connection between the two. Jamison v. Rockaway Twp. Bd. of Ed., 242 N.J. Super. 436, 445 (1990). In Carmona v. Resorts Intern'l, 189 N.J. 354

(2007), the New Jersey Supreme Court interpreted the elements of a reprisal case under the LAD to include a good faith and reasonableness requirement. In particular, the Court held:

[I]n a case in which a plaintiff alleges retaliation under the LAD, . . . the plaintiff bears the burden of proving that his or her original complaint--the one that allegedly triggered his or her employer's retaliation--was made reasonably and in good faith. The obverse also holds true: an unreasonable, frivolous, bad-faith, or unfounded complaint cannot satisfy the statutory prerequisite necessary to establish liability for retaliation under the LAD.

[Id. at 373.]. In so holding, the Court recognized that a plaintiff “need not prove the merits of the underlying discrimination complaint, but only that he was acting under a good faith, reasonable belief that a violation existed.” Id. at 373 (citing Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996)). If a plaintiff can make that *prima facie* showing, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for its adverse employment decision. If the defendant can meet that burden of production, then the Complainant, who retains the burden of persuasion, has the opportunity to show that the employer’s explanation was merely a pretext designed to mask unlawful reprisal. Young v. Hobart West Group, 385 N.J.Super. 448, 465 (App. Div. 2005).

Here, the ALJ found that Complainant failed to make out a *prima facie* case and that even if he did, that he failed to demonstrate that Respondent’s reasons for suspending him were pretexts for reprisal. In addressing Complainant’s *prima facie* burden, Respondent argued --and the ALJ agreed--that Complainant’s original DCR complaint was not made reasonably and in good faith since DCR issued a finding of no probable cause on the complaint and Complainant admitted in his deposition that some of his allegations were not true. Being mindful that in the context of a summary decision motion all reasonable inferences are to be made in favor of the non-moving party, and that a complainant’s burden at the *prima facie* stage is not onerous, the Director declines to dismiss the complaint on this basis.

The Director is somewhat troubled by making a finding of bad faith in a summary

judgment proceeding where, by its nature, no testimony is taken and the Complainant, as the non-moving party, is entitled to all favorable inferences. Brill, supra, 142 N.J. at 540. The DCR investigated the underlying discrimination claims and, while it did not find merit to the allegations, did not make any specific finding that they were brought in bad faith. Although it is unnecessary for purposes of this decision to reach the issue of whether Complainant brought the underlying claim in bad faith, some general observations are in order.

As an initial matter, establishing that a party acted in bad faith is a difficult task. The standard is high. For example, in Veneziano v. Long Island Pipe Fabrication, 238 F. Supp. 2d 683 (D.N.J. 2002), the court noted:

Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Id. at 692. Clearly, a finding of no probable cause by DCR does not amount to a finding of unreasonableness or bad faith. See, e.g., Brown v. Fairleigh Dickinson Univ., 560 F. Supp. 391, 406 (D.N.J. 1983) (“That a claim may turn out in the end to be groundless is not the necessary equivalent to it having been commenced in bad faith.”) A finding of no probable cause simply means that the DCR’s investigation produced insufficient persuasive evidence to credit the allegations of discrimination. See Sprague v. Glassboro, 161 N.J. Super. 218 (App. Div. 1978). The ALJ acknowledged as much when she noted that a “claim of retaliation is not limited to situations where an employee prevails on an underlying discrimination claim.” (ID 5) (citing Craig v. Suburban Cablevision, Inc., 274 N.J. 303, 310-11 (App. Div.), aff’d 140 N.J. 623 (1995)).²

² Respondent argues in support of its bad faith contention that Complainant admitted that he lied about one of the allegations in his discrimination complaint. (RE 2-3.) Respondent cites Complainant’s testimony regarding his statements at a DCR fact-finding conference that he was aware that Caucasian employees were also subjected to GPS monitoring. (RE 3) (citing TR 102:12-103:2). Complainant responds that he was distinguishing between his working group and the company as a whole, and simply alleging in his complaint that within his working group, all four African-American workers were assigned GPS devices and all eight

The Director also declines to draw any inference of bad faith from the fact that Complainant did not file an appeal of the no probable cause determination. The ALJ noted that, among other things, Complainant “did not appeal the DCR finding but attempted to re-litigate its findings through this appeal.” (ID 6.). The decision to pursue an appeal can be the product of a host of strategic, emotional, and economic considerations, and cannot fairly be said to infer a party’s knowledge that its initial claim was brought in bad faith. Although the Director appreciates that the ALJ afforded deference to the DCR’s finding of no probable cause in the discrimination matter, it bears repeating that nowhere in that finding did DCR conclude that the underlying matter was completely unfounded or unreasonable.

The Director also declines to dismiss the complaint on the basis that Complainant failed to show a sufficient causal connection between his DCR complaint and his subsequent suspensions to establish a *prima facie* case. Giving Complainant all reasonable inferences, a rational factfinder could conclude that the proximity in time between Complainant’s first complaint and his August 6, 2010 suspension satisfies the causation element. See, e.g., Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 549-50 (App. Div. 1995) (finding that a reasonable trier of fact could find a causal connection between the adverse employment action and the original protected action that occurred ten years earlier because a sophisticated employer would not immediately retaliate).

While declining to adopt the determination that Complainant failed to make a *prima facie*

Caucasian workers were not. (CE2-3; Cert. of Jones, ¶ 5) A review of Complainant’s deposition testimony reveals that he never specified whether he was referring to his particular group or Respondent’s entire staff when he stated that he was aware of Caucasian workers who were assigned a GPS telephone and made no admission of lying at the fact-finding conference. (TR 102:12-103:2.); Shelcusky v. Garjulio, 172 N.J. 185, 201-01 (2002). Complainant’s certification, particularly when afforded all favorable inferences, could explain any inconsistency with his prior sworn statements and the statements in his certification are sufficient to defeat Respondent’s summary decision motion on the issue of whether Complainant filed his initial complaint in bad faith.

case, the Director finds that the ALJ correctly found that Complainant failed to show that the Respondent's non-retaliatory business explanations for the two suspensions were somehow pretextual. Consequently, assuming, without deciding, that Complainant makes out a *prima facie* case, the instant retaliation claim fails on this basis and should be dismissed.

Merely establishing a *prima facie* case does not automatically entitle a complainant to a hearing. The New Jersey Supreme Court has instructed that even if a Complainant makes a *prima facie* case, he or she "does not qualify for a jury trial unless he or she can 'point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.'" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 455-56 (2005) (citing Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)). To satisfy that burden, a complainant "cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." Fuentes, supra, 32 F.3d at 765. Rather, the "non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory reasons." Ibid. (citations omitted).

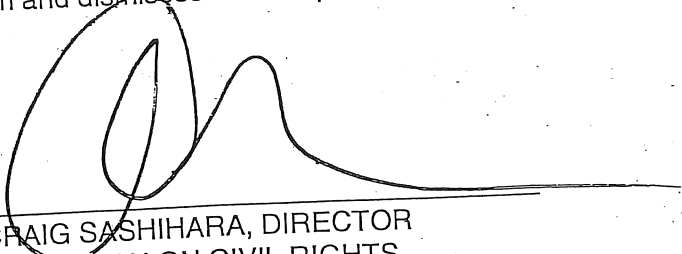
Complainant relies on his certification submitted in support of his opposition to the summary decision motion, without any effective competent testimony or documentation to support his allegations as to the existence of genuine issues of material fact. Complainant argues that there are outstanding issues of material fact as to whether he failed to account for his time on July 1, 2010, and whether he lied during his employer's internal investigation. (CE 5.) However, his certification makes no reference to those issues or any other of the events that

led to his one-day suspension. (Cert. of Clyde Jones.) With regard to the ten-day suspension, Complainant certified that the boots he wore to the job on the date in question were not worn, that Thompson lied about a customer complaining he was taking too long to complete the job, and that he, Complainant, did not lie during the internal investigation. (Cert. of Jones, ¶¶ 8-10.) Complainant's certification does not address Thompson's assertions that Complainant failed to observe safety guidelines in operating and parking his vehicle, failed to wear a reflective vest, failed to properly position orange cones, and turned his back to on-coming traffic while on the job, other than to baldly assert that Thompson "lied" without providing any supporting evidence. Nor does he dispute the assertion that Thompson was not even aware of Complainant's discrimination complaint at the relevant time and, therefore, fatally undercutting the notion that the conduct was motivated by a retaliatory animus. (Reply Cert. of Thompson, ¶ 3.). Complainant's certification merely alleging that there are factual disputes, without evidence of same, is insufficient to carry his burden. See El-Siofi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 174 (App. Div. 2005). Thus, even assuming that Complainant could establish a *prima facie* claim of retaliation, the fact remains that Complainant failed to establish the existence of any disputed material fact relative to whether Respondent's explanations for his suspensions were pretextual. Accordingly, the Director affirms the ALJ's decision granting Respondent's motion for summary decision as modified herein and dismisses the complaint.

CONCLUSION

After a careful review of the record in the light most favorable to Complainant, the Director concludes that Complainant has failed to establish the existence of any disputed material fact relative to whether Respondent's reasons for his suspensions were a pretext for unlawful reprisal. Accordingly, the Director adopts the ALJ's decision granting Respondent's motion for summary decision as modified herein and dismisses the complaint.

DATE: 12-12-12



CRAIG SASHIHARA, DIRECTOR
NJ DIVISION ON CIVIL RIGHTS